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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. CHARLES ALLEN DANCY, Defendant and Appellant.	C088673 (Super. Ct. No. CRF20184748)

Defendant Charles Allen Dancy was required to register as a sex offender. He registered as a transient in Sacramento, but lived with a woman in Davis. Following a jury trial, he was convicted of failing to register as a sex offender (Pen. Code, § 290, subd. (b)—count 1)[1] and failing to report a change of address as a sex offender

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[1] Undesignated statutory references are to the Penal Code.

(§ 290.013, subd. (a)—count 2) with three prior prison terms (§ 667.5, subd. (b)). He was sentenced to a six-year state prison term.

He contends on appeal (1) there was instructional error on the knowledge element of both offenses; (2) the instruction on the section 290.013 offense omitted necessary elements; (3) the trial court had a duty to instruct sua sponte on the mistake of law defense; (4) section 954 prohibits conviction for both count 1 and count 2; (5) the restitution fine, court operations assessment, and criminal conviction assessment must be stayed pursuant to *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*); and (6) cumulative error warrants reversal. In a supplemental brief, he contends the enactment of Senate Bill No. 136 requires the striking of the prior prison term enhancements.

While the instruction on the knowledge element for both offenses was correct, as the Attorney General correctly concedes, section 290.013 is inapplicable to defendant and there is insufficient evidence to support the conviction for this offense. Since there was insufficient evidence to support a mistake of law instruction, the section 954 claim is moot, and the cumulative error doctrine is inapplicable, we affirm count 1 and reverse count 2. Rejecting *Dueñas* but agreeing with the contention on the prison priors, we shall direct the trial court to strike the prison priors and remand for resentencing.

BACKGROUND

Prosecution Case

Defendant is required to register as a sex offender because of a 1984 felony conviction for sexual battery.

Evidence of a sex offender's registration obligations was presented through the testimony of law enforcement officers from both Davis and Sacramento County. A person required to register as a sex offender must go to the local police department and fill out the relevant form, read through all the advisements, and initial each advisement. Sex offenders with a permanent address must register annually in the jurisdiction where

they reside, while transient offenders must register each month in their jurisdiction. An offender who goes from transient to having an address must register that address within five business days. If a sex offender moves to another jurisdiction or to another city within the county that handles its own registration, the offender is required to register out of the original jurisdiction and into the new jurisdiction within five business days.

Davis Police Detective Joshua Helton oversaw the sex offender registration process in Davis and would speak with sex offenders when they registered in Davis for the first time. There was no record of defendant ever having registered in Davis.

Sacramento County Sheriff's Detective Greg Steindorf was assigned to monitor sex offenders in Sacramento County. Defendant was registered as a transient in Sacramento County from June 2014 to August 2018. Transients could register nearby intersections; defendant last listed his at the intersection of 68th Avenue and Power Inn Road. According to Detective Steindorf, if an offender has a residence where he spends the majority of his time, he is required to register even if he is not on the lease and sleeps on the couch. A transient sleeping on someone's couch for 30 or 60 days would be considered living there and was required to register at that address.

Yolo County law enforcement officers conduct home visits on all registered sex offenders in the county annually. Random checks on registered offenders are also conducted throughout the year. An officer would not check on an offender who was not registered in the jurisdiction.

Danielle J. lived in a four-bedroom, two-bathroom apartment on Alhambra Drive in Davis from late-2012 through July 2018. She initially lived there with all three of her daughters until one daughter moved out (and later back in) while another moved out to go to college.

Defendant started a romantic relationship with Danielle J. in 2015. He stayed in her apartment a couple of nights a week at first; after a while he stayed there regularly, keeping his clothes and toothbrush in the apartment. He would stay elsewhere only every

other weekend, when he stayed overnight with friends in Sacramento to gamble. Danielle J. did not tell anyone defendant was living with her because she did not want problems with her Section 8 housing status.

Danielle J. drove defendant to Sacramento once a month so that he could check in. At first, she did not know why he was checking in, but later learned it was to register as a transient sex offender in Sacramento. Defendant moved out of her apartment in the summer of 2017.

Danielle J.'s daughter B.B. testified that defendant would stay with her mother five days a week in September and October 2014. When she moved back in July 2015, defendant stayed there consistently, except for when he went to a friend's house to gamble.

Davis Police Officer Tony Dias went to Danielle J.'s apartment two times in 2017, but defendant was not there either time. Davis Police Officer Pheng Ly encountered defendant at Danielle J.'s apartment on July 3, 2017.

When Davis Police Officer Lyssa Gomez went to Danielle J.'s apartment on July 22, 2017, defendant answered the door. Officer Gomez discovered defendant was a registered sex offender; defendant said he was there only to help Danielle J. and occasionally spent the night there. The officer also saw defendant at the apartment earlier that month.

Defendant later admitted to a detective that he lived off and on at Danielle J.'s apartment.

The Defense

Testifying on his own behalf, defendant said he was a transient when he met Danielle J. He would stay off and on in Sacramento with his friends the Relifords. Defendant defined himself as a transient; he was "off and on," going to Danielle J.'s, his bed on 68th Avenue, in the street and in the hood.

Defendant and Danielle J. were friends. She would help him because he was very sick, picking him up and driving him from Sacramento to Davis every other week. Defendant would stay with Danielle J. for two or three days when she was sick, cooking, cleaning, and helping her with her medications. Defendant kept his clothes in a bag. He lived "off and on" with Danielle J., but did not believe he established residency there and therefore continued to register as a transient in Sacramento.

DISCUSSION

I

Instruction on Knowledge

A. *The Instructions*

The trial court instructed the jury for count 1[2] with a modified version of CALCRIM No. 1170, which states in pertinent part as follows:

"2. The defendant resided in Davis, California; [¶] 3. The defendant actually knew he had a duty under Penal Code section 290 to register as a sex offender and that he had to register within five working days of moving to Davis; [¶] AND [¶] 4. The defendant willfully failed to register as a sex offender with the City of Davis Police Department within five working days of moving to Davis. [¶] Someone commits an act *willfully* when he or she does it willingly or on purpose. [¶] Residence means one or more addresses where someone regularly resides, regardless of the number of days or nights spent there, such as a shelter or structure that can be located by a street address. A residence may include, but is not limited to, houses, apartment buildings, motels, hotels, homeless shelters, and recreational and other vehicles."

The trial court also instructed the jury with CALCRIM No. 250 as follows:

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[2] Although defendant makes the same claim for a similar instruction for count 2, since we are reversing that count for insufficient evidence, we limit our analysis to count 1.

"The crimes charged in this case require proof of the union, or joint operation, of act and wrongful intent. [¶] For you to find a person guilty of the crimes in this case, that person must not only commit the prohibited act or fail to do the required act, but must do so with wrongful intent. A person acts with wrongful intent when he or she intentionally does a prohibited act or fails to do a required act; however, it is not required that he or she intended to break the law. The act required is explained in the instruction for that crime."

B. *Analysis*

Defendant contends the jury was not properly instructed on the knowledge element regarding his duty to register the Davis address. He claims that while the instruction informed the jury that in count 1 he must know he had a duty to register and to register within five days of moving to Davis, the instruction did not tell the jury defendant had to actually know he established legal residence in the Davis apartment within the meaning of the Sex Offender Registration Act (the Act) (§ 290 et seq.) in order to willfully violate either statute.

Under section 290, a person subject to the Act has a lifetime obligation to register with the relevant law enforcement authority "within five working days of coming into, or changing his or her residence within, any city, county, or city and county, or campus in which he or she temporarily resides, and shall register thereafter in accordance with the Act . . . ." (§ 290, subd. (b).)

Transient and resident status are distinguished by the Act as follows: " 'transient' means a person who has no residence. 'Residence' means one or more addresses at which a person regularly resides, regardless of the number of days or nights spent there, such as a shelter or structure that can be located by a street address, including, but not limited to, houses, apartment buildings, motels, hotels, homeless shelters, and recreational and other vehicles." (§ 290.011, subd. (g).) Willful violation of any requirement under the Act is a felony. (§ 290.018, subd. (b).) In order to willfully

violate the Act, a defendant must have knowledge of the duties the Act imposes. (*People v. Garcia* (2001) 25 Cal.4th 744, 752.)

Defendant notes that CALCRIM No. 1170 has a provision for inserting the relevant specific address or addresses in question, which the Bench Notes state should be inserted if there is an issue whether the defendant actually knew that a place where he spent the time was a residence triggering the duty to register. (Bench Notes to CALCRIM No. 1170 (2020 ed.).) He asserts the omission of the requirement that he knew he had a duty to register at the Davis apartment was compounded by the trial court's error in giving the CALCRIM No. 250 general intent instruction.

Since we will be reversing count 2 for a failing to instruct and a failure of proof on another element, we limit our analysis to the section 290 charge in count 1.

The version of CALCRIM No. 1170 given here informed the jury that in order to convict defendant on count 1, it must find defendant resided in Davis and that he knew he had a duty to register within five working days of moving there. The instruction also defined the term "residence" in accordance with section 290.011, subdivision (g), effectively eliminating any theory of guilt that defendant had a duty to register as a transient in Davis. While, as the Bench Notes point out, listing the relevant address is appropriate where there is a question as to whether defendant knew of his duty to register there (see *People v. Poslof* (2005) 126 Cal.App.4th 92, 97-99 [upholding instruction using essentially the same language here but including the alleged new residence address]), it is not necessary here. While defendant contested at trial that he was a resident at Danielle J.'s apartment, he did not dispute spending time there and there was no evidence that he stayed anywhere else, either as a resident or transient, in Davis or in Yolo County. Thus, the jury had to find defendant knew he had to register in Davis in order to convict him on count 1. Since he could only have a duty to register in Davis if he was residing in Danielle J.'s apartment, the jury had to find that defendant knew he had a duty to register in Davis while living in Danielle J.'s apartment.

Defendant's reliance on *People v. LeCorno* (2003) 109 Cal.App.4th 1058 (*LeCorno*) is unpersuasive. The defendant in *LeCorno* was registered in San Francisco but did not register the residence of a friend in San Mateo where he often stayed while doing construction work. (*Id*. at p. 1061.) He was convicted of violating section 290, and on appeal, alleged instructional error on the knowledge element. (*Id*. at p. 1061.) During deliberations, in response to jury questions regarding whether the defendant had to know of his obligation to register the San Mateo address, the trial court responded: " 'It is not necessary that the prosecution prove that the defendant believed he had established a legal residence in order to prove that the defendant had actual knowledge of his duty to register as a sex offender. It is not necessary that the prosecution prove that the defendant had actual knowledge of the legal definition of residence in order to prove that the defendant had actual knowledge of his duty to register as a sex offender.' " (*Id*. at p. 1065.)

It is no surprise that the Court of Appeal concluded this was prejudicial error. (See *LeCorno, supra*, 109 Cal.App.4th at p. 1061.) "Not only did the trial court refuse to instruct that defendant must have known that he was required to register in San Mateo, but the supplemental instructions in response to the jury's questions told the jury explicitly, and incorrectly, that it was *not* necessary for defendant to have believed that he had established a legal residence in San Mateo and was required to register there. It is nonsensical to say that in order to purposefully fail to register, defendant must have knowledge only of an abstract duty to register, but that he need not know what that means or how it applies to his circumstances." (*Id*. at p. 1068.)

No such nonsensical instruction was given here. Not only was the jury instructed that defendant had to know of his duty to register, but also that his circumstances in Davis triggered the duty. *LeCorno* is inapposite.

While it was improper to give the general intent instruction of CALCRIM No. 250 for a section 290 charge (see *People v. Barker* (2004) 34 Cal.4th 345, 361 [error to

instruct with predecessor to CALCRIM No. 250, CALJIC No. 3.30 for § 290 charge]), the error was harmless beyond a reasonable doubt. (See *ibid.* [applying harmless beyond a reasonable doubt standard].) As previously stated, the CALCRIM No. 1170 instruction effectively required the jury to find defendant knew to reside in Danielle J.'s apartment triggered a duty to register. There was ample evidence defendant knew of this duty, and his primary defense was that he did not reside in Danielle J.'s apartment sufficiently to trigger the duty. We conclude the error was harmless beyond a reasonable doubt.

II

Count 2 Cannot Stand

Defendant contends the instruction for the section 290.013 charge in count 2 was erroneous regarding two elements.

Pursuant to section 290.013, a person subject "to the Act who changes his or her residence address, whether within the jurisdiction in which he or she is currently registered or to a new jurisdiction inside or outside the state, shall, in person, within five working days of the move, inform the law enforcement agency or agencies with which he or she last registered of the move, the new address or transient location, if known, and any plans he or she has to return to California." (§ 290.013, subd. (a).)

The trial court instructed the jury with a modified version of CALCRIM No. 1170 stating that in order to convict him under section 290.013, the jury had to find defendant knew he had a duty to register within five days of changing his residence address and that he willfully failed to inform the Davis Police Department within five days of changing residences. Defendant contends the instruction was erroneous by stating that (1) he had a duty to inform the Davis Police Department within five days of changing his residence, and (2) that the jury had to find only he knew he had a duty to register within five days of changing his address. According to defendant, he had no duty to inform the Davis Police Department of his move, instead, section 290.013 requires him to inform the law enforcement agency where he last lived, Sacramento, of his move. Likewise, the jury did

not have to find defendant knew he had a duty to register the move in Davis, but rather had to know he had to register it in Sacramento.

While we agree the instruction was erroneous, the Attorney General correctly identifies a more fundamental problem with the section 290.013 charge. Section 290.013 applies only to those who moved from a *residence address*. There is no evidence defendant had an address in Sacramento. Indeed, the evidence shows that defendant lived in Sacramento only as a transient.

Section 290.013 simply does not apply to defendant and the charge should have been dismissed pursuant to section 1118.1. We therefore reverse the conviction on count 2 for insufficient evidence that he was subject to registration as a resident in Sacramento when he moved to Davis.[3] Since there is insufficient evidence of one of the elements, defendant cannot be retried on remand. (*People v. Belton* (1979) 23 Cal.3d 516, 527, fn. 13.) As the trial court erroneously did not impose a sentence for count 1, a remand for resentencing is necessary. (*People v. Benton* (1979) 100 Cal.App.3d 92, 102.)

III

No Mistake of Law Instruction

Defendant contends the trial court had a duty to instruct sua sponte on mistake of law. While a mistake of law is generally not a defense to a crime (see *People v. Meneses* (2008) 165 Cal.App.4th 1648, 1661-1662), the defense is available if mistake of law negates an element of the crime like a specific mental state. (*People v. Noori* (2006) 136 Cal.App.4th 964, 977-978; *People v. Flora* (1991) 228 Cal.App.3d 662, 669.)

This defense is therefore potentially available to a section 290 charge, as a mistake of law could negate the knowledge element of the crime. A court has a duty to instruct

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[3] Our reversal moots defendant's claim that section 954 prevents conviction for both section 290 and section 290.013 in the same case.

sua sponte on the defense only if there is substantial evidence to support it and the defense is not inconsistent with the defendant's theory of the case. (*People v. Lawson* (2013) 215 Cal.App.4th 108, 119.) However, substantial evidence does not mean " ' " 'whenever *any* evidence is presented, no matter how weak.' " ' [Citations.]" (*People v. Wilson* (2005) 36 Cal.4th 309, 331.) It must be evidence that a reasonable jury could find persuasive. (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1049-1050.) Thus, "a mistake of law instruction is only appropriate where the evidence supports a reasonable inference that the claimed mistake was held in good faith. [Citation.]" (*People v. Flora, supra*, 228 Cal.App.3d at p. 669.)

The prosecution presented ample evidence defendant lived in Davis. In addition to Danielle J.'s and B.B.'s testimony, law enforcement officers encountered defendant at Danielle J.'s Davis residence multiple times. Defendant also admitted to a detective that he had lived in Davis, and testified that he "took it for the team because I didn't want her [(Danielle J.)] to lose her Section 8, and I didn't want her lying on her. So I didn't want to rat on her when she is in there lying on me." The only evidence that could support a mistake of law claim is defendant's testimony that he stayed there only for two or three days at a time, he kept his clothes in a bag, and believed he had not established residency.

In light of the considerable evidence of defendant's long term residency at Danielle J.'s apartment and his own admissions to law enforcement and in testifying, defendant's other testimony regarding the nature of the time he spent at Danielle J.'s and his asserted belief regarding his duty to register was insufficient to trigger a duty to instruct sua sponte on mistake of law.

IV

Dueñas

Defendant contends remand is required for an ability to pay hearing with respect to the restitution fine and court operations and conviction assessments. He cites in support *Dueñas, supra*, 30 Cal.App.5th 1157, which held that due process requires the

trial court to stay execution of restitution fines, as well as court operation and conviction assessments, until it has held a hearing and determined the defendant has the present ability to pay.

We join the courts concluding *Dueñas* was wrongly decided and hold that defendant was not entitled to an ability to pay hearing for the restitution fine and court operations and conviction assessments. (*People v. Kingston* (2019) 41 Cal.App.5th 272, 279; *People v. Hicks* (2019) 40 Cal.App.5th 320, 322, review granted Nov. 26, 2019, S258946; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1060; *People v. Caceres* (2019) 39 Cal.App.5th 917, 920.) We therefore reject the contention.[4]

V

Senate Bill No. 136

Defendant contends, and the Attorney General agrees, that recently enacted Senate Bill No. 136, which limits the prior offenses that qualify for a prior prison term enhancement, applies retroactively to his case. We agree.

On October 8, 2019, the Governor signed Senate Bill No. 136, which amended Penal Code section 667.5, effective January 1, 2020. (Stats. 2019, ch. 590, § 1.) Senate Bill No. 136 narrowed eligibility for the one-year prior prison term enhancement to those who have served a prior prison sentence for a sexually violent offense.

Defendant's prior prison terms at issue were not for sexually violent offenses. Defendant is therefore entitled to the ameliorative benefit of the statute if Senate Bill No. 136 is applied retroactively. We agree with the parties that the amendment to Senate Bill No. 136 should be applied retroactively in this case.

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[4] Defendant's final contention in his opening brief is that cumulative error regarding the instructions warrants reversal. Since the reversible error regarding count 2 was limited to that charge and the sole error as to count 1 was harmless beyond a reasonable doubt, the contention is without merit.

Whether a particular statute is intended to apply retroactively is a matter of statutory interpretation. (See *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 307 [noting " 'the role of a court is to determine the intent of the Legislature' "].) Generally speaking, new criminal legislation is presumed to apply prospectively unless the statute expressly declares a contrary intent. (§ 3.) However, where the Legislature has reduced punishment for criminal conduct, an inference arises under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), " 'that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.' [Citations.]" (*Lara*, at p. 308.) "A new law mitigates or lessens punishment when it either mandates reduction of a sentence or grants a trial court the discretion to do so. [Citation.]" (*People v. Hurlic* (2018) 25 Cal.App.5th 50, 56.)

Senate Bill No. 136 narrowed who was eligible for a Penal Code section 667.5, subdivision (b) prior prison term enhancement. There is nothing in the bill or its associated legislative history that indicates an intent that the court not apply this amendment to all individuals whose sentences are not yet final. Under these circumstances, we find that *Estrada*'s inference of retroactive application applies. (Accord, *People v. Lopez* (2019) 42 Cal.App.5th 337, 340-342 [Senate Bill No. 136 applies retroactively to cases not yet final on appeal]; *People v. Jennings* (2019) 42 Cal.App.5th 664, 680-682 [same].)

DISPOSITION

Defendant's conviction for violating section 290.013 in count 2 is reversed, the trial court is directed to strike the three prior prison term enhancements, and the matter is remanded for resentencing. In all other respects, the judgment is affirmed.

/s/
BLEASE, J.

We concur:

/s/
RAYE, P. J.

/s/
RENNER, J.